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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Market Entry and Regulation of)
Foreign-Affiliated Entities)

IB Docket No. 95-22
RM-8355
RM-8392

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REPLY COMMENTS

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TABLE OF CONTENTS

SUMMARY

I.	THE COMMISSION SHOULD EXPAND ITS OVERSIGHT OF FOREIGN AFFILIATION TO INCLUDE GLOBAL ALLIANCES	2
II.	RULES THAT PROMOTE COMPETITION BY PERMITTING FLEXIBILITY FOR U.S. CARRIERS SHOULD BE ADOPTED BY THE COMMISSION.	5
A.	Streamlining and Expediting the Section 214 Process	5
B.	The Commission Should Adopt Swidler & Berlin's Points Beyond Proposal	7
C.	The Commission Should Adopt IDB's Definition for a Facilities-Based Carrier	9
III.	CONCLUSION	11

SUMMARY

MFS International, Inc. ("MFSI") joins a number of commenting parties in urging the Commission to broaden its focus in the international arena beyond foreign carrier market entry to effectively address issues of market access, undue discrimination, and the anti-competitive impact of all types of alliances and relationships between U.S. and foreign international carriers on the competitiveness of the U.S. telecommunications market, and to implement oversight procedures that will ensure that such alliances do not adversely impact the public interest.

In addition, MFSI respectfully submits that the Commission should heed the warnings of a number of parties that the Commission should refrain from adopting policies that inhibit the flexibility of emerging U.S. competitive carriers to compete abroad at a time when global alliances pose a significant threat to a competitive international services market. MFSI joins a number of commenting parties in urging the Commission to adopt certain pro-competitive proposals that will enable the Commission to effectuate the Notice of Proposed Rulemaking's stated goals of encouraging effective global competition, preventing anticompetitive conduct, and encouraging foreign governments to open their communications markets. Specifically, MFSI respectfully submits that incorporating certain streamlined procedures to the Section 214 application process (as suggested by the British Government, Communications TeleSystems, Inc. and NYNEX Corporation), Swidler & Berlin's "points beyond" proposal, and IDB Communication Group Inc.'s proposal for a uniform definition of facilities-based carriers in the Commission's international services policies will advance the Commission's express goals by permitting U.S. carriers to maximize niche market opportunities in foreign markets.

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REPLY COMMENTS

MFS International, Inc. ("MFSI"), by its undersigned counsel, hereby submits its reply comments in the above-captioned proceeding.^{1/}

MFSI, along with a number of other commenters, respectfully encourages the Commission to broaden its focus in this rulemaking proceeding beyond foreign carrier market entry to effectively address issues of market access, undue discrimination, and the anti-competitive impact of all types of alliances and relationships between U.S. and foreign international carriers on the competitiveness of the U.S. telecommunications market, and to implement oversight procedures that will ensure that such alliances do not have an adverse impact on the public interest. MFSI also urges the Commission to heed the warnings of a number of commenters that the Commission should refrain from adopting policies that inhibit the flexibility of emerging U.S. competitive carriers to compete abroad at a time when global alliances, which are rapidly forming among dominant international carriers, pose a significant threat to a competitive international services market.

^{1/} Notice of Proposed Rulemaking ("NPRM"), FCC 95-53 (released February 17, 1995).

I. THE COMMISSION SHOULD EXPAND ITS OVERSIGHT OF FOREIGN AFFILIATION TO INCLUDE GLOBAL ALLIANCES.

MFSI shares the concerns expressed by a number of commenters that the Commission's existing policies and the *NPRM* do not adequately address the potential anticompetitive dangers posed by the recent dramatic combinations of strategic alliances and associations of formerly independent competitors in the global telecommunications marketplace. *See e.g., ACC Global Corp. ("ACC") Comments at 5; LDDS Communications, Inc. ("LDDS") Comments at 7.* MFSI therefore joins a number of commenters in urging the Commission to ensure that its review of foreign carrier affiliations include a thorough review of the activities of U.S. carriers, including AT&T Corp. ("AT&T"), that have substantial relationships of any kind with a major foreign carrier, regardless of whether the foreign carrier makes an equity investment in the U.S. carrier. *BT North America Inc. ("BT-NA") Comments at 14; Deutsch Telecom ("DT") Comments at 58-59; France Telecom ("FT") Comments at 13; LDDS Comments at 7; MCI Telecommunications Corporation ("MCI") Comments at 13; Sprint Communications Company L.P. ("Sprint") Comments at 5-6.*

As a number of parties correctly point out, even when alliances are purportedly "non-exclusive," there can be numerous built-in incentives that increase the likelihood that unaffiliated carriers will receive inferior treatment.^{2/} *ACC Comments at 6-7; BT Comments at 13-15; DT Comments at 58-59; FT Comments at 12-13; MCI Comments at 13-14; Sprint Communications Company L.P. ("Sprint") Comments at 30-31.* ACC, DT, and MCI, *inter alia*, correctly

^{2/} As MCI aptly notes, AT&T recently successfully maintained in the *Royalty/Funding (United States v. Western Electric Co., 12 F.3d 225 (D.C. Cir. 1993))* appeal that the Court should reject the BOCs' argument that affiliation is limited to situations of ownership control. *MCI Comments at 60.* Indeed, AT&T took the position that "anything that can be accomplished by ownership' of two firms in vertical markets 'can also be accomplished by a properly drawn contract' between two firms." *Id.* at 29-30, n. 20.

recognize that co-marketing arrangements such as AT&T's WorldPartners and Uniworld alliances raise the alarming specter of anticompetitive conduct (in relation to proportionate return, accounting rates, correspondent agreements, and the introduction of new services) against unaffiliated U.S. carriers. In addition to the natural incentives for alliance members to favor allied carriers, as Sprint aptly points out, AT&T can use its substantial market power and resources^{3/} to coerce and/or provide side benefits (*e.g.*, heavily discounted prices for telecommunications equipment) to its alliance partners so that unaffiliated U.S. carriers are discriminated against.

Indeed, MFSI's experience since the formation of AT&T's WorldPartners and Uniworld alliances is quite instructive. Previously productive and good faith negotiations for correspondent agreements between MFSI and a number of foreign dominant carriers have virtually stalled since the formation of these AT&T led alliances.

MFSI therefore joins ACC, DT, FT, LDDS, MCI and Sprint in strongly urging the Commission to monitor and to impose certain conditions on any major U.S. carrier participating in an alliance with major foreign carriers. MFSI respectfully suggests that the Commission heed the recommendations of BT-NA and ACC that all major U.S. carriers with substantial shares of the U.S. international telecommunications traffic be required to seek prior and formal Commission approval of such alliances. *BT-NA Comments at 14; ACC Comments at 8*. Further, MFSI concurs with FT, MCI, Sprint and ACC that, at a minimum, the conditions imposed on

^{3/} As ACC pointed out in its Comments, AT&T recently announced its best year of earnings and revenue growth since the 1984 breakup of AT&T's monopoly. *ACC Comments at 11, n.6*. Further, ACC noted that analysts have observed that "[t]he scale and power of AT&T -- long an industry giant -- is now breathtaking . . . with presence in every area of the mushrooming global telecommunications industry." *Id. (citing AT&T's '94 Profit Highest Since '84 Breakup, The Washington Post, Jan. 25, 1995, at F4)*.

MCI as a requirement of participation in the BT/MCI alliance should be imposed on any major U.S. carrier participating in an alliance with major foreign carriers. *FT Comments at 14; MCI Comments at 14-15; Sprint Comments at 34; ACC Comments at 9.* In addition, MFSI agrees with ACC that the Commission should adopt the following additional safeguards to ensure that the pro-competitive goals of the *NPRM* are achieved: (1) approve a major U.S. carrier's participation in an alliance only after the carrier demonstrates that the proposed allied foreign carrier's home market is sufficiently liberalized for U.S. carriers to enter and effectively compete in the foreign market, including a specific finding that correspondent agreements are made freely available to unaffiliated U.S. carriers without substantial entry barriers (*e.g.*, unnecessary high minimum traffic commitments and technology upgrade or other up-front payments); (2) require the U.S. participant to guarantee that its foreign affiliate(s) will make all negotiated accounting rates simultaneously available to all U.S. carriers;^{4/} and (3) impose full dominant carrier regulation on AT&T on all international routes where it is allied with a foreign carrier that possesses market power, including the WorldPartners arrangement and the Uniworld joint venture.

This proper exercise of the Commission's oversight powers will allow the Commission to fulfill its public interest mandate by supporting the development of increased global competitiveness by U.S. telecommunications carriers, increase the incentive for closed foreign markets to adopt more open policies, place additional pressure on above-cost accounting rates, and lower the prices consumers pay for telecommunications services around the world.

^{4/} Recent actions of allied carriers show that the need for such a safeguard is well-grounded. In its comments, Sprint notes that "the Philippines Long Distance Telephone Co., which is a member of AT&T's WorldPartners alliance, and Syriat Telekom Malaysia, which is the member of yet another AT&T-led alliance called Pacific Partners, granted AT&T -- and AT&T alone -- temporary accounting rate reductions." *Sprint Comments at 32-33, n. 26.*

II. RULES THAT PROMOTE COMPETITION BY PERMITTING FLEXIBILITY FOR U.S. CARRIERS SHOULD BE ADOPTED BY THE COMMISSION.

In order to further the Commission's stated primary goal of promoting effective competition in the global telecommunications market, MFSI respectfully urges the Commission to adopt rules that provide U.S. carriers with the flexibility needed to establish competitive service offerings in niche markets abroad. As LDDS perceptively observes, "[t]he single most successful U.S. telecommunications policy in recent memory has been the policy of promoting the maximum feasible competition in the United States and abroad." *LDDS Comments at 5*. Accordingly, as discussed in further detail below, MFSI joins a number of commenters in urging the Commission to adopt certain pro-competitive proposals that will enable the Commission to effectuate the *NPRM's* stated goals of encouraging effective global competition, preventing anticompetitive conduct, and encouraging foreign governments to open their communications markets.

A. Streamlining and Expediting the Section 214 Process

Consistent with the suggestions of the British Government ("U.K."), Communications TeleSystems International, Inc. ("CTS") and NYNEX Corporation ("NYNEX"), MFSI respectfully submits that the Commission should streamline the current Section 214 application process.^{5/} Specifically, MFSI agrees with the U.K. that the Commission should minimize unnecessary regulation. *See U.K. at 2-3*. For example, the Commission should issue one Section 214 authorization for routes that satisfy the Commission's equivalency standard. As new countries are added to the list, authorized carriers should be able to offer service on new routes without obtaining a separate authorization.

^{5/} MFSI notes that the Commission has a pending docket on simplifying the Section 214 application process.

MFSI also concurs with the U.K., CTS and NYNEX that the Commission should accelerate its review process for all Section 214 applications so that the process is not misused to simply delay or prevent market entry by both U.S. and foreign carriers. *See U.K. Comments at 1; CTS Comments at 8; NYNEX Comments at 8.* The Commission therefore should set time limits, after the completion of the comment period, for it to grant or reject Section 214 applications. *See U.K. Comments at 1; NYNEX Comments at 8.*

As CTS correctly notes, "incessant petitions to deny serve to delay the onset of additional competition and to impose administrative burdens upon the FCC." *CTS Comments at 8.* Such petitions serve the petitioner's purposes by wreaking havoc with the business plans of applicants, especially emerging competitive carriers.^{6/} For instance, ACC aptly points out that while AT&T has repeatedly attempted to limit Commission scrutiny of its various alliances and services, it has "aggressively invoked the Commission's regulatory process to delay and restrain international private line resale competition by employing a variety of discredited regulatory arguments in its 'Petitions to Deny.'"^{7/} *ACC Comments at 10-11.* Accordingly, MFSI joins CTS in urging the Commission to adopt rules that curtail the anticompetitive tactic of filing groundless Petitions to Deny. In particular, MFSI urges the Commission to adopt the proposal of CTS that imposes affirmative obligations on protesting carriers so that such petitioners also have reporting obligations, and are required to file affidavits verifying the accuracy of the petition as well as confirming that the protesting carrier is in compliance with applicable FCC

^{6/} For example, CTS points out that AT&T's protest delayed for more than one year a foreign carrier's investment in a small, start-up U.S. international carrier. *CTS Comments at 4.*

^{7/} ACC's Comments note that AT&T has "unabashedly and repeatedly proffer[ed] in its Petitions to Deny the Commission-rejected mirror reciprocity standard (*i.e.*, equivalency of foreign markets must be based on an environment that mirrors the U.S.)." *ACC Comments at 11, n. 25.*

rules (*e.g.*, file information on the effects of "country direct" service on the U.S. settlements deficit pursuant to Section 43.61). *CTS Comments at 9.*

B. The Commission Should Adopt Swidler & Berlin's Points Beyond Proposal.

MFSI commends the Commission for recognizing in the *NPRM* the need to increase business opportunities for U.S. companies in the international telecommunications marketplace. As major international carriers race to form global alliances which threaten the development of emerging U.S. competitive international carriers, the Commission should develop policies that promote the competitive efforts of U.S. companies, and refrain from adopting rules that may hamstring the flexibility of nascent competitive carriers to provide services abroad. Accordingly, MFSI strongly endorses the proposal of Swidler & Berlin, Chartered ("S&B") that "the Commission modify, on an expedited basis, its international private line resale policy to permit carriers to provide service to 'points beyond' the equivalent country when the Commission grants a carrier Section 214 authority to serve a specified country." *S&B Comments at 1.* MFSI submits that permitting the routing of traffic between the U.S. and third countries through leased lines between the U.S. and designated equivalent locations will provide emerging competitive carriers with the flexibility to effectively compete in the global telecommunications market, encourage development of international services competition, and place increased pressure on foreign governments to open their markets for telecommunications services.^{8/}

^{8/} The Commission should disregard AT&T's self-serving claim that allowing U.S. carriers to route traffic to "points beyond" will increase the settlements deficit by supporting above-cost accounting and collection rates. As S&B correctly points out, "in the context of imposing a 'points beyond' restriction the concern expressed by large facilities-based carriers about the 'settlements deficient' is a 'straw man.' The Commission should have in its possession adequate data to demonstrate that some large carriers' 'country-direct' and other related U.S. inbound service offerings contribute to a far greater proportion of the so-called 'settlements deficit' than

As S&B correctly recognizes, the elimination of the "points beyond" restriction would provide greater routing flexibility and promote the achievement of the Commission's goals in this *NPRM*. *Id.* at 2. Further, MFSI concurs with S&B's view that such a modification would permit U.S.-owned carriers to establish competitive service offerings in niche markets abroad and to utilize least-cost routing to configure their networks efficiently.^{2/} *Id.* MFSI underscores the S&B view that allowing carriers to route traffic to "points beyond" the equivalent country would be an effective mechanism for increasing pressure on closed foreign markets to adopt liberalized policies and placing additional pressure on above-cost accounting rates by allowing bypass of high non-equivalent direct routes to the third countries in favor of routings through the competitive equivalent intermediate "hub" countries.

S&B also perceptively states that permitting U.S. carriers to provide service to "points beyond" the equivalent country is in the U.S. public interest because it generally encourages global competition, and provides new entrants trying to establish services in foreign markets with the flexibility needed to compete effectively with large dominant carriers. *Id.* at 20. Since the first form of entry permitted in foreign markets is often resale, allowing initiation of resale through the provision of service to "points beyond" permits customers to become familiar with a new U.S. entrant while concomitantly allowing the new entrant to enter a market with lower capital costs than would be required to undertake facilities construction. MFSI submits that encouraging competitive entry through flexible routing arrangements permits U.S. carriers to establish a foothold in a foreign market as liberalization occurs. In addition, the elimination of

the proportion of the market share that small private line resellers can ever hope to capture." *S&B Comments* at 9.

^{2/} MFSI acknowledges that this example, of course, would not apply to the few countries (*e.g.*, Germany) that permit direct access to INTELSAT.

the "points beyond" restriction will encourage the development of increased price and service competition with the global alliances among dominant carriers by permitting U.S.-owned resale carriers the opportunity to become established in foreign jurisdictions.

C. The Commission Should Adopt IDB's Definition for a Facilities-Based Carrier.

MFSI joins IDB Communications Group, Inc. ("IDB") in urging the Commission to adopt a uniform definition of an international facilities-based carrier based on the purchase of the maximum interest in an international facility permitted by law. *See IDB Comments at 20-37.* MFSI reiterates that adopting IDB's clear definition would: (1) vitiate arbitrary and discriminatory distinctions between otherwise similarly-situated carriers; (2) encourage competition by allowing U.S. companies to establish themselves in foreign markets; and (3) encourage foreign governments to liberalize further regulatory structures that impose barriers to competition.

MFSI submits that, as with the "points beyond" restriction, the current Commission disparate treatment of leased foreign half circuits and leased U.S. half-circuits limits the ability of U.S. carriers to compete in the international telecommunications marketplace. This inconsistent policy may lead to arbitrary and discriminatory distinctions that will hamper the efforts of U.S. telecommunications providers attempting to establish footholds in foreign markets. As IDB correctly points out, under the Commission's current policy, which regards foreign leased half circuits as resale (assuming that the foreign country has not been designated as offering "equivalent" opportunities), a U.S. carrier that leases capacity from INTELSAT and is treated as a facilities-based carrier for the U.S. half-circuit could only provide end-to-end international private line service to its end-user customer by corresponding with a foreign carrier, even if the U.S. carrier has an affiliate in the foreign country. The Commission policy

would foreclose U.S. carriers from participating in the private line market in those newly-opened foreign markets which are taking the first steps in initiating competition. *IDB Comments at 25*. MFSI concurs with IDB's view that the asymmetric treatment of U.S. and foreign carriers engaged in the same activity would result in discrimination that would favor foreign PTTs and over U.S. carriers. *Id. at 26*.

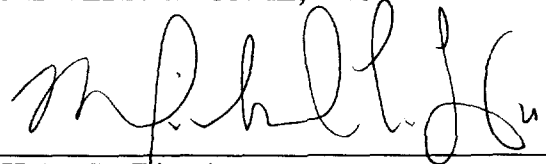
Alternatively, MFSI supports IDB's proposal that, at a minimum (if the Commission declines to adopt a uniform definition for facilities-based carrier), the Commission should adopt a definition that ensures that its international private line resale policy does not restrict U.S. carrier entry into newly-opened markets. Accordingly, the Commission should adopt a definition that considers affiliates of U.S. companies as facilities-based carriers. *Id. at 37*. This compromise solution would allow U.S. carriers to maximize the niche market opportunities created in newly-open foreign markets.

III. CONCLUSION

For the foregoing reasons, MFSI respectfully urges the Commission to expand its oversight so that it can adequately address the impact that global alliances have on the U.S. international telecommunications market and to refrain from adopting policies that inhibit the flexibility of emerging U.S. competitive carriers to compete abroad.

Respectfully Submitted,

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